IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF JOE M. LAUB.

No. 36322

FILED

JAN 09 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

ORDER OF SUSPENSION

This is an automatic appeal from a Northern Nevada Disciplinary Board hearing panel's recommendation that attorney Joe M. Laub be suspended for six months, and that he be ordered to pay the costs of the disciplinary proceeding. In his briefs to this court, Laub denies that his conduct violates the Rules of Professional Conduct, with two "technical" exceptions, and that no more than a private reprimand for these "technical" violations is warranted. We conclude that the hearing panel's recommendation should be approved.

FACTS

Background

Joe Laub was admitted to practice in Nevada in 1989 and is also licensed in California. He is currently a partner in the firm Laub & Laub with his father, Melvin Laub. In 1997, when Melvin Laub's ability to practice was limited for health reasons, he relinquished the firm's day-to-day operations to Joe Laub. The firm has offices at Lake Tahoe and in Reno, and is engaged primarily in plaintiffs' personal injury work and some criminal cases. Joe Laub works in both the Reno and Lake Tahoe offices. Testimony at the disciplinary hearing indicates that Laub is an avid tennis player and skier, and that at times he was absent from the office to pursue these interests. He has not been subject to any prior discipline.

Charles Perez runs three affiliated companies -- PSI, Medical Acquisition Corporation, and Horizon Five Plus -- that are engaged in two areas of business that are relevant to this case, both related to the medical services field.

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First, Perez offers "surgery on a lien" services to personal injury plaintiffs who require medical treatment but cannot afford it because they do not have health insurance or sufficient assets to pay for the treatment. In such situations, Perez investigates the likelihood of the plaintiff's recovery based on the case for liability and the availability of insurance to cover the cost of the treatment plus prior medical bills. If Perez is satisfied that the plaintiff has a good case and that there is sufficient insurance, he will negotiate with medical providers, many of which are part of a network he maintains. The medical providers agree to discount their normal fees in exchange for a cash payment from Perez, and to assign their bills, in their customary amounts, to him. Once a settlement is reached (or recovery is otherwise obtained), Perez is repaid from the proceeds. The difference between the cash amount Perez actually paid and the customary amount he receives from the proceeds constitutes Perez's profits. If no recovery is obtained, then Perez loses his "investment."

The second activity in which Perez and his companies engage is known as "medical factoring." Unlike "surgery on a lien," in which Perez is involved in making arrangements for medical services, medical factoring occurs after medical services have been rendered, without arrangement by Perez. Perez negotiates with medical providers to purchase their liens for medical services at a discount, in exchange for an assignment of the lien in its original amount. Perez is then repaid from the recovery, and the difference between the discounted amount he paid and the original lien amount is his profit. It appears from Perez's testimony that, for both types of activities, he sometimes passes on a portion of the savings to the injured plaintiff, but feels no obligation to do so.

Relationship between Perez and Laub

Perez and Laub met in the summer of 1995, apparently when a California lawyer employed by Laub & Laub, Jordan Morgenstern, introduced them. Morgenstern learned of Perez's "surgery on a lien" services, and believed they would be useful to some of the firm's clients. Laub introduced Perez to the firm's employees in the Reno office and stated that he could be of assistance if a client needed medical treatment but had no ability to pay. The testimony conflicted as to whether Laub also introduced Perez to the Lake Tahoe office employees. The evidence

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also conflicted as to the scope of assistance Laub told the employees to give Perez. Sheila Parker, a legal assistant formerly employed by the firm in its Reno office, testified that if an employee thought a client might benefit from Perez's services, she was required to obtain Laub's permission before contacting Perez. But she also testified that Perez was given "carte blanche" to come in and view client files in search of cases he might be interested in.

Laub and Perez both testified that at their initial meeting, Perez discussed only the "surgery on a lien" services, not his "medical factoring" activities. Perez stated that he did not disclose the medical factoring to Laub because it was "none of his business." Perez repeatedly stated that he needed no authority to buy the liens, and that he was free to do as he wished in this area.

Laub indicated that if he had known of the factoring activities, he would not have dealt with Perez. Nevertheless, the record reflects that Laub continued to deal with Perez for over a year after the last possible date he could have learned of Perez' factoring activities.

Also, Laub accepted several payments from Perez after Perez had arranged medical services and obtained assignments of medical liens for at least two Laub & Laub clients.[1] In March 1996, Perez issued Laub a check for $10,000. In 1997, Perez issued two more checks to Laub, one for $1,900 and one for $6,360.41. The last two checks bore a notation that they were for "legal fees." But all three checks were deposited in Laub's personal account, not the Laub & Laub account. Perez testified that the first check was to "thank" Laub for referring him to other lawyers in Nevada, and that the other checks were for legal services rendered by Laub in evaluating a few cases (in which the plaintiffs were not represented by Laub & Laub) for Perez. Laub also indicated that the last two checks were for legal services, and that they were not deposited in the firm's account because he did not use firm staff and "it was efforts that [he] had done . . . basically outside of Laub & Laub and [its] operation." Laub stated that he was not sure why he was given the first check, but assumed it was for marketing assistance he rendered Perez. Perez issued

[1]Laub's acceptance of these payments could indicate a conflict of interest. See SCR 157(2). For unknown reasons, however, no such violation was charged in the disciplinary complaint.

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1099 statements to Laub, and Laub paid income tax on these amounts. In March 1998, at Melvin Laub's request, Laub returned the full amount of these payments to Perez, to avoid the appearance of impropriety. We note that Laub accepted the two 1997 payments well after he knew of Perez's factoring activities.

<u>The Sartain case</u>

Theresa Sartain was rendered a quadriplegic in a one-vehicle accident involving a Peterbilt truck in which she was a passenger. She and her husband, Gary, and their two children live outside Chicago, Illinois. The accident took place in Nevada on August 26, 1995. Gary was notified of the accident, and he and the children flew to Reno on August 27th.

A few days after the accident, Gary took the children for a walk from Washoe Medical Center, where Theresa was hospitalized. Along the way, they passed Laub & Laub's Reno office. Gary went in and asked to speak to an attorney about Theresa's case. He was told that there was no attorney present at the moment, but that he could come back the following day and meet with one.

Gary returned the following day and met with Jordan Morgenstern. Morgenstern was an experienced personal injury lawyer licensed in California, but he was not admitted in Nevada. He worked in both the Reno and Lake Tahoe offices of Laub & Laub.

Morgenstern and Gary executed a contingency fee agreement providing that the firm would receive one-third of any recovery as its fee, and would also be reimbursed for costs. The agreement did not contain the mandatory language of SCR 155(3), in bold as required by the rule, that in the event of a loss, the client could be liable for the opposing party's attorney fees and costs. Laub testified that the Sartain case was the largest ever handled by Laub & Laub.

Gary testified that his understanding was that the firm would pursue all possible defendants, including the driver and his employer, any maintenance providers, and the manufacturer of the truck and/or sleeping berth, on all possible theories, including negligence and products liability. After an investigation, the firm made a demand on the employer's liability policy for the policy limit of $1,000,000. The demand letter was signed by Laub. The insurer initially took the position that it would not pay, because there was evidence suggesting that Theresa may have contributed

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to the accident, and because the driver may not have been acting in the course and scope of his employment at the time of the accident. Despite this initial defense, a settlement was eventually reached.

Gary is a carpenter, and has health insurance through the carpenter's union. At the time of Theresa's accident, there was some confusion over whether he had sufficient hours as a carpenter for full medical coverage. As a result, coverage for Theresa's medical bills was initially denied.

In September 1995, Theresa was scheduled to be released from the hospital to a rehabilitation center, but the Sartains could not find a center that would accept her because of their health insurance issues. Morgenstern told Gary that Perez might be able to help and gave him Perez's number. After Gary called Perez, and told him about Theresa's situation, Perez investigated the case and agreed to arrange for Theresa's admission to a rehabilitation center. He contracted with the center to pay Theresa's bill there at a discount, in exchange for an assignment to Perez of the full customary amount. Theresa was transferred to the rehabilitation center on September 18, 1995.

Shortly thereafter, Theresa expressed a desire to return to Chicago. Gary and the children had returned weeks before, and Theresa did not want to stay in Reno, so far away from her home and family. Because of her medical condition, the only way to transport her to Chicago was by an air ambulance with adequate medical personnel to monitor her. Gary researched such services, and found that it would cost between $15,000 and $28,000. The Sartains could not afford this amount.

Gary contacted Perez, and Perez arranged for Theresa to travel to Chicago by air ambulance. He agreed to pay the company $7,500 in cash, and they assigned him their bill in the amount of their customary charge, $26,000. Theresa was flown home on October 4, 1995.

The case settled in November 1995 for the full policy limit of $1,000,000. At the disciplinary hearing, conflicting testimony was presented concerning how anxious the Sartains were to receive the proceeds. Mona Atnip, a legal assistant and office manager of the Lake Tahoe office, testified that the Sartains called frequently asking why a settlement had not been reached yet and demanding that some recovery be obtained immediately. After the settlement, they repeatedly demanded that the money be disbursed as soon as possible. Gary testified that he

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and Theresa were most interested in obtaining the maximum amount from all possible defendants, not in this particular settlement. Gary stated that the only reason for urgency was that Morgenstern had told him that the trucking company (or the insurance company – the record is not clear) was in financial trouble and might go into bankruptcy, and so the settlement should be concluded as soon as possible.

On December 9, 1995, Morgenstern met with the Sartains in Chicago to complete the settlement documents. Documents executed at this meeting included a release in favor of the trucking company and a "cost and disbursement statement."

The cost and disbursement statement was intended to summarize how the settlement proceeds would be distributed. It indicated that Laub & Laub would receive one-third of the settlement as its fee, plus a small amount that had been advanced for costs. It also listed several medical bills that would be paid from the proceeds, and that Laub & Laub would attempt to reduce the amount of these bills. Finally, it stated that a portion of Laub & Laub's fee would stay in the trust account to serve as a fund from which to cover costs in any products liability case. The statement did not indicate that any sums would be paid to Perez, or to anyone other than the listed medical providers, nor did it indicate that anyone other than Laub & Laub would negotiate with the medical providers. Gary and Theresa signed the statement.

By January 1996, Perez had negotiated with most of Theresa's medical providers to purchase their liens. Two exceptions were Washoe Medical Center and Hoffman Estates Medical Center (a medical center in the Chicago area where Theresa stayed after her return to Illinois). Through one of his companies, Perez sent a demand to Laub & Laub for payment of the amount of the liens, minus a $45,000 discount. A check, signed by Melvin Laub, was issued the following day.

Also in January 1996, the money remaining in the trust account to fund a products liability suit was disbursed to Laub & Laub's general account. Melvin Laub testified that the funds were released because the firm had determined that there was no viable products

liability case.[2] He also testified that they had attempted to refer the Sartains' case to several lawyers who practice in that area, and none was willing to take the case. The record contains no evidence that anyone at the firm communicated to the Sartains that no products liability case would be pursued, and Gary testified that he did not receive any such notice.

By March 1996, the Sartains apparently were unhappy with the firm's representation, particularly the failure to aggressively pursue a products liability claim. That month, the Sartains met with Laub and Melvin Laub in Carson City. This meeting was contentious, but at its end, the Sartains were still represented by Laub & Laub. Other than a brief introductory meeting between Laub, Theresa, Gary and Morgenstern at the Reno rehabilitation center in late September 1995, this was the only time Laub met with either Sartain.

By April 1996, the carpenter's union had agreed to cover at least some of Theresa's bills, including the Washoe Medical Center bill (except a $3,000 co-pay) and the Hoffman Estates bill. Perez negotiated with Washoe Medical Center to purchase its rights to the $3,000 co-pay; he also negotiated with the union to purchase its claim for reimbursement of the amounts it had paid to Washoe Medical Center and Hoffman Estates. Then, through one of his companies, he sent a demand to Laub & Laub for these amounts, with no discount. Perez testified that Laub was angry that Perez did not discount his demand, and attempted to convince Perez to reduce his demand so that more money could go to the Sartains. Perez refused, and had his lawyer send a demand letter to Laub & Laub with a threat to sue if the money was not paid promptly. A check, signed by Laub, was issued the next day.

At the disciplinary hearing, Gary testified that he had understood that no funds from the lawsuit would be paid to Perez. Theresa stated that she was unaware of any arrangement for the Reno rehabilitation center, but knew that Perez would be reimbursed from the proceeds for the air ambulance flight. Perez testified that he told them that he would be reimbursed for both the rehabilitation center bill and the

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[2]It is not clear who made this determination: Morgenstern, Laub, Melvin Laub, or some combination. Morgenstern did not testify at the panel hearing.

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air ambulance flight bill from the lawsuit proceeds. Perez testified that he explained to the Sartains, but not to Laub, that he would purchase prior medical liens in order to have a first position lien on the lawsuit proceeds. The Sartains stated that they believed Perez was an employee of, or at least formally affiliated in some way with Laub & Laub, based on statements made by Morgenstern and Perez.

The record reflects that Morgenstern was assigned primary responsibility for the Sartain case, despite his lack of a Nevada license. At some point during the pendency of the Sartain case, personality conflicts between Laub and Morgenstern reached a critical point, and Morgenstern was reassigned to the Lake Tahoe office. He took the Sartain case with him. Despite Laub's admission that the Sartain case was the largest ever handled by the firm, his personal involvement with the case appears to have consisted of the September 1995 meeting at the Reno rehabilitation center, the March 1996 meeting in Carson City, and signing the demand letter to the insurance company. Laub did not clarify why he, rather than Morgenstern, signed the demand letter.

The Landrith case

David Landrith was homeless and unemployed, and had no health insurance. He was seriously injured when he was struck by a car while walking and was treated at Washoe Medical Center. Michael Decker, a nonlawyer employee of Laub & Laub, initially met with Landrith at the hospital to discuss his case. Decker then executed a contingency fee agreement on behalf of the firm. Landrith signed the agreement. The agreement was on the same form as in the Sartain case, which did not contain the attorney fees and costs language in bold as required by SCR 155(3).

Decker testified at the disciplinary hearing that it was the firm's normal practice for him to conduct the initial meeting with a client and execute the fee agreement. Laub testified that this policy has since been changed, and that attorneys now conduct all initial meetings, and only attorneys can execute fee agreements. Laub nevertheless contends in his brief that there was nothing improper in Decker performing these activities, and asserts that many other "volume" personal injury firms assign such tasks to nonlawyers.

Landrith required a halo cast as a result of his injuries. Apparently, this type of cast can only be removed surgically, and Landrith

had no insurance or assets to pay for the surgery. A Laub & Laub employee gave Landrith Perez's number and told him that Perez might be able to arrange for the surgery. Perez testified that, after investigation, he made the arrangements, but that Landrith did not have the surgery. Landrith did not testify at the hearing, and so it is not known why he did not have the surgery, or whether and how the cast was eventually removed.

While the case was pending, Landrith asked Laub for some money to help with his living expenses. On two occasions, Laub advanced him funds -- the first time $2,000, and the second time $1,000. Laub stated that he did not know that this practice was prohibited by SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client), that he was only trying to help an indigent client, and that after learning of the rule's provisions, he no longer advances funds in this manner.

The case settled for the driver's insurance policy limit of $100,000. The cost and disbursement statement for the case lists Laub & Laub's fee (one-third of the settlement), the two advances together with two $75 "administrative charges" for the advances, and unspecified "medical bills."

While the case was pending, Perez successfully negotiated with Washoe Medical Center for assignment of its lien in exchange for payment at a discount. His company then made a demand upon Laub & Laub for the full amount of the bill. Laub issued a check the next day. Laub testified at the hearing that he was angry that Washoe Medical Center would negotiate with Perez when it refused to negotiate with local lawyers,[3] and was angry with Perez for not discounting his demand, but that he was required to pay the lien. Additionally, Laub testified that Landrith tried to convince Laub to give him the amount owed to Washoe

[3]At the hearing, the testimony of Laub and others indicated that Washoe Medical Center consistently refuses to reduce its liens when approached by local personal injury lawyers. It appears that Washoe Medical Center gave Perez a discount by mistake, and later attempted to collect additional sums from Landrith. Washoe Medical Center eventually dropped these efforts and wrote off the remaining amount. The record does not reveal whether Laub or the firm assisted Landrith in persuading Washoe Medical Center to cease its collection efforts.

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Medical Center; Laub refused because of the statutory lien held by the hospital.

Disciplinary proceedings

The Sartains and Landrith complained to the state bar. After investigation and presentation to a screening panel, the state bar filed a two-count formal complaint concerning both grievances.

Count I concerned the Sartain case. It contained a description of Perez's involvement in the case, and contained a general allegation that Laub's conduct violated SCR 151 (competence), SCR 154 (communication), SCR 165 (safekeeping property) and SCR 203(3) (misconduct involving dishonesty, fraud, deceit or misrepresentation). The products liability claim is not mentioned anywhere in the complaint, nor were any violations of SCR 156 (confidentiality) or SCR 157(2) (conflict of interest) charged.

Count II concerned the Landrith case. It alleged several violations based on specific conduct, as follows:

- SCR 189(2) (unauthorized practice of law) and SCR 187 (responsibilities concerning nonlawyer assistants), because Laub permitted Decker to execute contingency fee agreements and to consult with clients concerning the merits of their cases in initial interviews;
- SCR 155(3) (fees: contingency fee agreements), because the fee agreement did not contain the mandatory language in bold concerning attorney fees and costs;
- SCR 154 (communication), because Laub failed to communicate with Landrith concerning the fee agreement before it was signed;
- SCR 153 (diligence), because Laub failed to adequately investigate whether Washoe Medical Center had asserted a lien against Landrith's settlement at the time the proceeds were received and available for distribution, did not distribute the insurance proceeds to Landrith after deduction of the firm's fees and costs, did not attempt to reduce the amount of Washoe Medical Center's lien, and/or did not advise Landrith that he was entitled to the funds if a lien had not been properly perfected by Washoe Medical Center;[4]

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[4]It appears that this last allegation would more properly be a violation of SCR 154 (communication).

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- SCR 154 (communication), because Laub failed to communicate the status of Landrith's obligation to pay Washoe Medical Center from the settlement proceeds, and failed to explain that a reduction may have been possible;
- SCR 153 (diligence), because Laub failed to adequately investigate whether Washoe Medical Center had assigned its lien to Perez's company and if it had, the amount Perez paid;
- SCR 154 (communication), because Laub failed to inform Landrith of the status and nature of a hospital account, of his right to the proceeds in the absence of a validly perfected lien, that the lien had been assigned to Perez's company, and that Washoe Medical Center might have been willing to reduce its bill;[5]
- SCR 165 (safekeeping property), because Laub failed to notify Landrith of the receipt of funds, and paid Perez's company without a valid perfected lien by Washoe Medical Center or any authorization from Landrith to pay Perez's company; and
- SCR 158(5) (conflict of interest: prohibited transactions), because Laub advanced money to Landrith.

Laub filed an answer to the bar's complaint. With regard to the Sartain case, Laub denied that he had any knowledge of Perez's medical factoring activities, and pointed out that the demand letter from Perez's company does not identify Perez in any way, and is signed by another individual. Laub denied that he had violated any of the rules charged by the state bar. With respect to the Landrith case, Laub admitted that he violated SCR 155(3), because the contingency fee agreement did not contain the mandatory language. He also admitted to a violation of SCR 158(5), because he advanced money to Landrith, but pointed out in mitigation that Landrith was indigent and needed funds, and that the settlement was consummated less than two weeks later. Laub denied the remaining violations.

At the formal hearing, witnesses included Theresa and Gary Sartain, Michael Decker, Sheila Parker, Charles Perez, Mona Atnip, and Melvin and Joe Laub. The panel found that Laub had committed two

[5]This charge appears duplicative of the previous SCR 154 charge.

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violations of SCR 151 (competence), one violation of SCR 154 (communication), and one violation of SCR 203(3) (misconduct involving dishonesty, fraud, deceit or misrepresentation) in his representation of the Sartains; the panel found that Laub had not violated SCR 165 (safekeeping property). With respect to the Landrith case, the panel found that Laub had committed one violation each of SCR 153 (diligence), SCR 154 (communication), SCR 155(3) (fees), SCR 158(5) (conflict of interest: prohibited transactions), SCR 187 (responsibilities concerning nonlawyer assistants), and SCR 189(2) (unauthorized practice of law); the remaining violations charged in the complaint were not found. Based on its written findings, the hearing panel issued a recommendation that Laub be suspended for six months. This automatic appeal followed.

DISCUSSION

Sartain products liability claim

Two of the violations found by the panel with respect to the Sartain case concern the Sartains' possible products liability claim. Specifically, the panel found that Laub violated SCR 151 (competence), by failing to pursue such a claim, and SCR 154 (communication), by failing to communicate with the Sartains about whether they had a viable products liability claim or about the decision to transfer the funds held back for costs from the firm's trust account to the general account.

Laub argues that he has been denied due process because the complaint did not assert any charges based on a possible products liability claim, and so he was not notified of any such charges. The state bar weakly argues that since it attached the cost and disbursement statement to the complaint, and the statement mentioned a possible products liability claim because of the funds being held back for costs, Laub was on notice that his conduct concerning the products liability claim was subject to review. The state bar also argues that Nevada is a notice-pleading jurisdiction, and that its complaint was sufficient under this standard. In reply, Laub argues that the rules of civil procedure do not apply to bar complaints; rather, SCR 105(2) governs.

This court recently reiterated in In re Discipline of Schaefer[6] that due process requirements must be met in bar proceedings, and that

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[6]117 Nev. ___, 25 P.3d 191, as modified by 31 P.3d 365 (2001).

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an attorney charged with misconduct must be notified of the charges against him. Also, SCR 105(2) provides that "[t]he complaint shall be sufficiently clear and specific to inform the respondent of the charges against him or her." Here, the complaint makes no mention whatsoever of the products liability claim, and the record reflects that the state bar never sought to amend the complaint to include violations based on this claim. We conclude that Laub was not adequately notified of any charge against him based upon the Sartains' possible products liability claim, and that these violations must be disregarded.

Misstatements in Sartain cost and disbursement statement

Another violation found by the panel concerned the cost and disbursement statement from the Sartain case, which indicated that Laub & Laub was attempting to reduce the amounts of medical bills. The panel found that this statement was false and misleading, because there was no evidence that any such reductions were sought by Laub & Laub. The panel thus concluded that Laub violated SCR 203(3) (misconduct involving dishonesty, fraud, deceit or misrepresentation). Laub argues that he did not prepare the statement, sign it, or view it before the Sartains signed it, and so cannot be responsible for any inaccuracies. The state bar did not respond to this argument in its answering brief.

The testimony at the hearing indicates that Laub was the attorney responsible for handling the Sartains' case. While the record reflects that Jordan Morgenstern performed most of the work on the case, Morgenstern was not a Nevada licensed attorney. Thus, his activities on behalf of the Sartains could only be those of a law clerk or paralegal, and could only permissibly be performed under the direct supervision of a Nevada attorney, in this case, Laub.[7] We therefore conclude that Laub was responsible for the content of the cost and disbursement statement, and consequently, for any misrepresentations contained in it. "[A]n

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[7]See SCR 77 (providing that "no person may practice law . . . who is not an active member of the state bar"); SCR 189(2) (providing that "[a] lawyer shall not . . . [a]ssist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law"); NRS 7.285(1)(a) (providing that "[a] person shall not practice law in this state if the person . . . [i]s not an active member of the State Bar of Nevada or otherwise authorized to practice law in this state pursuant to the rules of the supreme court").

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attorney is liable, in malpractice or as an ethical violation, for his paralegal's acts."[8]

We also agree with the hearing panel that the statement was misleading, because there is no evidence that any Laub & Laub employee sought reductions in any of the medical liens. In addition, the reductions obtained by Perez were not for the Sartains' benefit. Accordingly, we conclude that the violation of SCR 203(3) has been shown by clear and convincing evidence.

Expert testimony and SCR 151 violation in Sartain case

The panel concluded that Laub violated SCR 151 (competence) by failing to properly investigate Perez before allowing him to become involved with the firm's clients, and by failing to attempt to reduce the Sartains' medical bills.

With respect to his investigation of Perez, Laub argues that he checked Perez's references and that this effort was adequate. He further asserts that any problems arising from Perez's involvement concerned his medical factoring activities, and that Perez did not disclose these activities to him.

Laub also argues that while his practice is generally to attempt to reduce a client's medical bills by negotiating with the provider, such a practice is not required. According to Laub, a failure to do so should not be an ethical violation, since the medical providers are in fact under no duty to reduce their bills and, in the absence of any claim that a bill is improper, are entitled to payment. Laub does not assert that any reductions were attempted.

Finally, analogizing to malpractice cases, Laub argues that to establish a violation of SCR 151, the state bar must show through expert testimony what a competent lawyer would have done, and that his conduct fell below that standard. As the state bar presented no such evidence, Laub asserts that this violation is not supported.

The state bar argues that the violation concerning Laub's investigation of Perez consists of the inadequate investigation coupled with the "carte blanche" access to the firm's files that was afforded to

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[8]In re Estate of Divine, 635 N.E.2d 581, 587 (Ill. App. Ct. 1994); see also SCR 187 (responsibilities concerning nonlawyer assistants).

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Perez.[9] The bar further asserts that "[a]s experienced practitioners, the panel determined Laub had a duty pursuant to SCR 151 (competence) to at least attempt a good faith reduction of medicals." The bar appears to argue that the rule itself provides a standard of competence ("legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"). The bar does not specifically address Laub's contention that expert testimony is required, and does not argue that any was presented.

With regard to his investigation of Perez, Laub testified that Perez gave him the names of two attorneys in Southern California as references, that he called these attorneys and "they praised [Perez]." He recalled the name of one, but could not recall the other. Perez testified that he did not initially mention his medical factoring activities to Laub because they were "none of his business"; the record reflects that, at the absolute latest, Laub learned of Perez' involvement in medical factoring activities in April 1996. Sheila Parker testified that Perez had "carte blanche" access to client files; Laub admitted that the type of access described by Parker would jeopardize the attorney-client privilege, but denied that this scope of access was afforded to Perez. Joe and Melvin Laub both testified that their general practice was to attempt to reduce medical bills, but both stated that it was not required.

It appears that the panel gave weight to Parker's testimony over Laub's concerning the access provided to Perez. Also, the panel either disbelieved Laub's testimony concerning his efforts to investigate Perez, or considered them to be so inadequate as to be no investigation at all. Clearly, the panel did not believe that it required expert testimony to establish a standard of competence.

We have found no case in which expert testimony was required to establish a lack of competence in a disciplinary proceeding.[10]

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[9]It appears that the crux of this violation is the broad access given to Perez; it is not clear from the record why a violation of SCR 156 (confidentiality) was not charged.

[10]See In re Flanagan, 690 A.2d 865 (Conn. 1997); In re Masters, 438 N.E.2d 187, 191-92 (Ill. 1982); In re Disciplinary Action Against Howe, 621 N.W.2d 361, 365 (N.D. 2001); In re Disciplinary Action Against McDonald, 609 N.W.2d 418, 424 (N.D. 2000); Hawkins v. Commission for Lawyer Discipline, 988 S.W.2d 927 (Tex. App. 1999).

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Reasons given by these courts for not requiring expert testimony include that it would not be helpful to the disciplinary body, that the disciplinary body was a panel of experts and so was able to assess the lawyer's conduct independently, that ethical rules set forth standards acceptable to members of the bar in general, not of any specialty, that requiring expert testimony would place too onerous a burden on both sides in discipline cases, and that interpretation of ethical rules involves a question of law for the court, and so no expert testimony is required. We find the reasoning of these cases persuasive.

Here, Laub was found to have violated SCR 151 (competence) in the Sartain case. We conclude that expert testimony was not necessary to establish that a competent lawyer will at least attempt to reduce a client's medical liens, especially when the lawyer has specifically represented that such efforts will be made. In this regard, we note that an attorney has a duty to negotiate for the client to the best of his or her ability, whether those negotiations be with the opposing side, the opposing side's insurer, or the client's own medical providers.

Next, the extent of access to client files that was provided to Perez seriously jeopardized the attorney-client privilege of the firm's clients. Expert testimony was not needed to establish that a lawyer does not act competently by causing the clients' confidences to be placed in such a precarious state.

Finally, a lawyer has a duty to conduct a reasonable investigation of persons to whom the lawyer refers his client for services such as those rendered by Perez. We are not satisfied that Laub's two phone calls fulfilled this duty.

We thus conclude that the violation of SCR 151 is supported by clear and convincing evidence.

Violations of SCR 154, 187, and 189 in Landrith case

The panel determined that Laub violated SCR 187 (responsibilities regarding nonlawyer assistants) and SCR 189(2) (unauthorized practice of law) by failing to adequately supervise Michael Decker and by permitting him to engage in conduct that constituted the practice of law in connection with the firm's representation of Landrith. Specifically, the panel found that Decker met with Landrith, concluded that he had a meritorious claim, explained the contingency fee agreement to him, and signed the agreement on the firm's behalf. The panel also

found that Laub violated SCR 154 (communication) by not being involved at the time the fee agreement was executed and by his failure to explain the contingency fee agreement to Landrith before he signed it.

Laub argues that Decker's actions did not constitute the practice of law, and that Decker previously engaged in similar activities when he worked for another personal injury firm. In addition, Laub points out that Decker evaluated personal injury cases in his previous career as an insurance claims adjuster, and had considerable experience in this area. Laub contends that the fee agreement was self-explanatory and needed no elaboration by Decker, and that Decker simply used a form agreement – he did not engage in negotiations with Landrith or exercise discretion in preparing the document.

Laub asserts that many people who are not licensed to practice law in Nevada engage in similar conduct, such as a nurse or hospital employee explaining a release that a patient is asked to sign. He further argues that bar counsel, law clerks, Supreme Court staff attorneys, and certain justices of the peace are not required to have Nevada law licenses, and engage in conduct that even more clearly resembles the practice of law, "yet nobody would suggest that these people should be prosecuted by the State Bar for committing ethical violations of Rules 187 and 189." Finally, Laub asserts that the bar's position "ignores the realities of plaintiffs' personal injury practice in modern society." He claims that many plaintiffs would not be able to find counsel if plaintiffs' personal injury lawyers could not delegate a great deal of work to paralegals and staff.

The state bar argues that Decker's experience is irrelevant; if he does not have a license, he cannot practice law. Similarly, Decker was not employed in a position covered by a specific exception to the general rule that requires a law license, such as those applicable to bar counsel, staff attorneys, etc., and so these exceptions are irrelevant. The state bar notes that fee agreements "are not always clear and unambiguous, especially to a lay person." The state bar also asserts that a determination as to whether a potential client has a viable case requires a legal conclusion, and that only a lawyer should be permitted to accept or reject a case and sign a fee agreement on behalf of a firm.

SCR 187(2) provides that "[a] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that

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the person's conduct is compatible with the professional obligations of the lawyer." SCR 187(3)(a) provides that if a nonlawyer employee engages in conduct that would be an ethical violation if performed by a lawyer, the lawyer engages in misconduct by ordering or ratifying the conduct. SCR 189(2) provides that a lawyer shall not assist a nonlawyer in conduct that constitutes the unauthorized practice of law.

Neither Laub nor the state bar cites to any authority defining what constitutes the practice of law, or to any authority discussing factually similar cases. We have reviewed several cases from other jurisdictions,[11] and conclude that the decision of whether to represent a particular client calls for an exercise of professional judgment, and that the attorney-client relationship must be formed with the attorney, not a nonlawyer assistant. In addition, a nonlawyer assistant may not be delegated the task of advising a client or potential client about his or her legal rights and remedies.

Decker's activities crossed the line between permissible paralegal duties and those that must be performed by a lawyer. The firm's relationship with Landrith was initially formed, not with the attorney, but with the paralegal. Decker was not subject to any supervision in making the determination to represent Landrith, nor in any statements he may have made to Landrith about the terms of the fee agreement or the viability of Landrith's case. In particular, Decker should not have had the authority to advise potential clients about the possibility of recovery, or to make the decision about whether to represent a client.

We also note that Laub's argument concerning the "realities" of plaintiffs' personal injury practice is without merit. Since the commencement of this disciplinary proceeding, Laub & Laub has changed its practices so that an attorney always conducts the initial interview with a potential client. While many duties may be delegated to nonlawyer assistants, the lawyer must retain control over the case, and must properly supervise the nonlawyer. That did not happen in this case. The

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[11]See McMackin v. McMackin, 651 A.2d 778 (Del. Fam. Ct. 1993); Louisiana State Bar Ass'n v. Edwins, 540 So. 2d 294 (La. 1989); Attorney Griev. Comm. v. Hallmon, 681 A.2d 510 (Md. 1996); Attorney Griev. Com'n v. James, 666 A.2d 1246 (Md. 1995); In re Opinion No. 24, 607 A.2d 962 (N.J. 1992).

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violations of SCR 187 and 189 are supported by clear and convincing evidence.

With respect to the SCR 154 (communication) violation, Laub argues that there is no evidence that Landrith had any questions about the fee agreement, or that any explanation was required. Laub asserts that the panel is attempting to set a standard for personal injury attorneys without any evidence, in the form of expert testimony or otherwise, to support what that standard should be. In contrast, the state bar argues that SCR 154 contemplates that a lawyer, not a nonlawyer, will communicate important aspects of the case to the client, and that communications concerning a contingency fee agreement fall within the category of "important aspects."

SCR 154 provides that a lawyer shall keep a client reasonably informed, shall explain a matter to the extent reasonably necessary for the client to make informed decisions, and shall promptly comply with reasonable requests for information from the client. As discussed above, the duties delegated to Decker, including responsibility for the initial client meeting at which the client's potential claims would be discussed, exceeded the scope of duties that may permissibly be delegated to a nonlawyer. By failing to meet with Landrith himself, or to have a licensed Nevada attorney meet with him to advise him about the viability of a claim, Laub failed to adequately communicate with Landrith. Accordingly, this violation is supported by clear and convincing evidence.

Violation of SCR 153 in Landrith case

The panel found that Laub violated SCR 153 (diligence) by failing to adequately investigate whether Perez's company had properly acquired Washoe Medical Center's lien, and whether that lien was perfected, before paying Perez's demand the following day.

Laub asserts that he or his staff did investigate the claim. He also argues that regardless of whether the lien was perfected, there is no question that Washoe Medical Center was actually owed the amount asserted, or that Perez's company was assigned Washoe Medical Center's rights. The state bar, on the other hand, contends that the panel did not find Laub's testimony that he investigated the claim to be credible. The state bar further makes the conclusory argument that one day is insufficient for a proper investigation.

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We conclude that one day was sufficient time for the firm to verify the fact and amount of Washoe Medical Center's bill, and that it was validly assigned to Perez's company. The documentation in the record demonstrates that both the bill itself and the assignment were valid. We therefore conclude that this violation is not supported by clear and convincing evidence.

Violations of SCR 155(3) and 158(5) in Landrith case

Laub admitted that his contingency fee agreement in the Landrith case did not meet the requirements of SCR 155(3) (fees: contingency fee agreements). The violation is thus supported by clear and convincing evidence. If he has not already done so, he must revise the firm's form agreements in accordance with SCR 155(3).

Laub also admitted that his actions in advancing money to Landrith violated SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client), but maintains that he did so only to help an indigent client, and in ignorance of the rule's prohibition on such an advance. We conclude that this violation is established by clear and convincing evidence. Laub's ignorance is no excuse, nor is it a mitigating factor. Laub, and every Nevada lawyer, is responsible for knowing what the Rules of Professional Conduct require. In addition, while Laub's motives may have been innocent, such conduct is clearly prohibited by the rule. We also note that Laub's claims of sympathy for the client are somewhat belied by the "administrative charge" assessed against Landrith for each of the advances.

Propriety of recommended discipline

Based on its findings, the panel recommended a six-month suspension and payment of costs. Laub argues that this sanction is grossly disproportionate to his conduct. He argues that his conduct was at most negligent, and that a suspension is not warranted.

In support, Laub relies on In re Drakulich,[12] in which this court rejected a hearing panel's recommendation for a ninety-day suspension and concluded that no discipline was warranted. In Drakulich, the hearing panel had given credence to the testimony of two former secretaries in determining that Drakulich had entered into a fee-sharing

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[12]111 Nev. 1556, 908 P.2d 709 (1995).

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arrangement with an employee of Reno Orthopedic Clinic.[13] This court, conducting a de novo review of the record, rejected the panel's findings and accepted the testimony of Drakulich and the clinic employee that the arrangement did not involve the sharing of fees.[14] Laub asks this court to follow Drakulich and impose no more than a private reprimand for his "technical" violations of SCR 155(3) (fees: contingency fee agreements) and SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client).

Finally, Laub asserts that no further discipline is required to protect the public, but that if this court determines that some sanction should be imposed, a private reprimand is more than sufficient. He argues that a public reprimand will have serious financial consequences for the firm, which advertises heavily, and will punish Melvin Laub as well. Laub also maintains that the panel recommended such a harsh sanction because the panel members do not like personal injury lawyers who advertise heavily, such as Laub.

According to the state bar, the panel found a lack of candor in Laub's testimony at the hearing, and his conduct demonstrated more than mere negligence. The state bar also disputes Laub's charge that the panel members were biased against him. Finally, the state bar maintains that the recommended discipline is appropriate.

At the hearing, bar counsel argued that if the panel concluded that Laub's conduct was no more than negligent, then a public reprimand would be appropriate discipline. Bar counsel maintained, however, that the evidence supported a finding that Laub was more than negligent, and consequently, more severe discipline was warranted. According to bar counsel, the free access provided to Perez, coupled with the payments from Perez to Laub that were deposited in Laub's personal account, support an inference that Laub was aware of Perez's activities and acquiesced in them.

Although the recommendations of the disciplinary panel are persuasive, this court is not bound by the panel's findings and recommendation, and must examine the record anew and exercise

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[13]Id. at 1557, 908 P.2d at 709-10.

[14]Id. at 1570-72, 908 P.2d at 717-19.

independent judgment.[15] In determining whether the recommended discipline is appropriate, the ABA Standards for Imposing Lawyer Sanctions[16] may be consulted for guidance. In this case, application of the ABA Standards to the violations shown could result in a public reprimand, suspension or disbarment.[17]

Considering these standards, and in light of the fact that Laub has received no prior discipline, we conclude that a six-month suspension falls squarely within these guidelines, and that it is an appropriate form of discipline in this case. Although we disregard the violations based on the Sartains' products liability claim and the SCR 153 violation in the Landrith case, the remaining violations demonstrated by the record amply support the panel's recommended discipline.

In addition, we reject Laub's assertion of bias on the part of the panel members. He has not supported his contention with any citation to the record, and our review of the record has not revealed any evidence of bias during the proceedings.

"Unpublished" discipline decisions

In support of his contention that the recommended discipline is too harsh, Laub attached an appendix to his brief consisting of summaries of recent Nevada Lawyer discipline decisions. He asserts that since these dispositions were published in the Nevada Lawyer, they can be cited as authority, even though they are not opinions of this court.

The state bar argues that under SCR 123 (citation to unpublished opinions and orders), the Nevada Lawyer articles cannot be

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[15]In re Kenick, 100 Nev. 273, 680 P.2d 972 (1984).

[16]American Bar Ass'n, ABA Standards for Imposing Lawyer Sanctions, in ABA Compendium of Professional Responsibility Rules and Standards 329 (1999).

[17]See Standard 4.51 (providing that "[d]isbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client"); Standard 4.42(b) (providing that "[s]uspension is generally appropriate when . . . a lawyer engages in a pattern of neglect and causes injury or potential injury to a client"); and Standard 4.63 (providing that "[r]eprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client").

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relied upon. Laub, however, argues that his citation of Nevada Lawyer discipline articles does not violate SCR 123, because they were not cited as binding legal precedent. Rather, they were cited so that this court could conduct a "consistency analysis" in determining whether the recommended discipline was appropriate. Laub notes that in Drakulich,[18] this court cited to an anonymous reprimand that did not appear in the Nevada Reports, and that this court has cited to its own unpublished orders as providing factual examples related to the court's consistency,[19] as well as to unpublished decisions of other courts.[20] Laub also argues that SCR 123 does not require that cited authority be published in the Nevada Reports, and that publishing in the Nevada Lawyer is sufficient. Finally, Laub argues that this court serves as the sentencing body in discipline cases, and so it is appropriate to consider additional information bearing on the determination of what sentence to impose.

SCR 123 provides that an unpublished opinion or order of this court shall not be regarded as precedent and shall not be cited as legal authority except in limited circumstances, which do not apply to this case. SCR 115(3) provides that orders imposing suspensions or disbarment shall be "published" in the same manner as advance opinions, and SCR 115(5) provides that such orders shall be "published" in the state bar journal and in a newspaper of general circulation in the county in which the attorney practiced. SCR 121 provides that a public reprimand by this court shall be "published" in the same manner as advance opinions, and that a public reprimand issued by the state bar[21] shall be "published" in the state bar publication.

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[18]111 Nev. at 1571, 908 P.2d at 718.

[19]State, Dep't of Transp. v. Barsy, 113 Nev. 709, 941 P.2d 969 (1997), overruled in part by GES, Inc. v. Corbitt, 117 Nev. __, 21 P.3d 11 (2001).

[20]Naovarath v. State, 105 Nev. 525, 529-30, 779 P.2d 944, 947 (1989) (citing to unpublished draft opinion); Christensen v. Chromalloy Amer. Corp., 99 Nev. 34, 38 n.1, 656 P.2d 844, 847 n.1 (1983) (citing to unpublished federal decision).

[21]See SCR 113(5) (providing that the state bar shall issue and publish a public reprimand when discipline imposed pursuant to a conditional guilty plea in exchange for stated form of discipline includes a public reprimand).

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We conclude that the word "unpublished" in SCR 123 means an opinion or order that is not published in the Nevada Reports. The rule appears almost immediately after SCR 121 and SCR 115, both of which provide that discipline orders shall appear in the Nevada Lawyer and be disseminated in the same manner as advance opinions. If Laub's interpretation were correct, then SCR 123 would have no meaning in bar discipline cases, because every discipline order of this court would be published. Clearly, the rule is not meant to render every discipline order from this court a published opinion, with the same precedential value as those opinions that appear in the Nevada Reports.

We nevertheless conclude that discipline orders appearing in the Nevada Lawyer may be cited to this court for the limited purpose of providing examples of the discipline imposed in similar fact situations. This approach has also been taken by several other courts.[22]

We caution counsel, however, that such orders generally do not include a full statement of the facts, and are often brief, with little discussion of the reasoning supporting the decision. Accordingly, they may easily be distinguished and are not entitled to undue reliance. Discipline orders that are the result of a conditional guilty plea pursuant to SCR 113 are, by their nature, especially summary. As pointed out by the Washington Supreme Court, "a lesser, stipulated sanction [is] analogous to a plea bargain – and just as irrelevant for purposes of attorney discipline as a plea bargain in another criminal case would be for sentencing purposes following a jury trial."[23]

We have considered the unpublished discipline orders discussed by Laub in his briefs and compiled in his appendix. We note that the vast majority of the orders cited by Laub were not issued by this court, but by panels of the respective disciplinary boards, and thus provide no assistance. The few orders from this court that are discussed in Laub's

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[22]See, e.g., Berman v. City of Daly City, 26 Cal. Rptr. 2d 493, 496 n.5 (Ct. App. 1993); Marez v. Dairyland Ins. Co., 638 P.2d 286, 289 n.2 (Colo. 1981); Manderfeld v. Krovitz, 539 N.W.2d 802, 807 n.3 (Minn. Ct. App. 1995); Leisure Hills of Grand Rapids v. DHS, 480 N.W.2d 149, 151 n.3 (Minn. Ct. App. 1992).

[23]In re Boelter, 985 P.2d 328, 340 (Wash. 1999).

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briefs involved very different facts, and do not demonstrate that the recommended suspension here is too harsh.

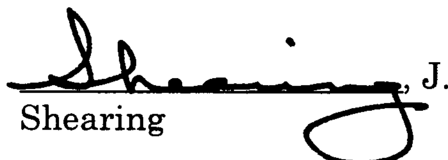
CONCLUSION

The following violations are supported by clear and convincing evidence: SCR 151 (competence) based on Laub's failure to protect the attorney-client privilege, his failure to adequately investigate Perez, and his failure to attempt to reduce the Sartains' medical bills; SCR 203(3) (misconduct involving dishonesty, deceit, fraud or misrepresentation), based on the misleading cost and disbursement statement provided to the Sartains; SCR 154 (communication), SCR 187 (responsibilities regarding nonlawyer assistants) and SCR 189 (unauthorized practice of law), based on Laub's overdelegation of duties to Decker; SCR 155(3) (fees: contingency fee agreements), based on the absence of mandatory language in Laub's contingency fee agreements; and SCR 158(5) (conflict of interest: prohibited transactions; advancing money to client), based on Laub's advances to Landrith. We disregard the violations of SCR 151 (competence) and SCR 154 (communication), concerning the products liability claim in the Sartain case, and SCR 153 (diligence), concerning Laub's investigation of the basis for Perez's demand in the Landrith case.

Based upon the violations shown, we suspend attorney Joe M. Laub from the practice of law for six months. In addition, Laub shall pay the costs of the disciplinary proceeding. Laub and the state bar shall comply with SCR 115. We note that as the suspension is for no more than six months, Laub need not petition for reinstatement.[24]

It is so ORDERED.

_______________, J.
Young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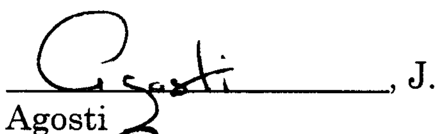
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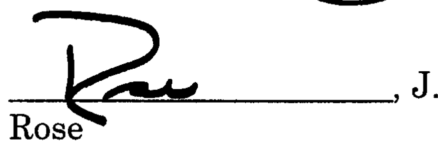
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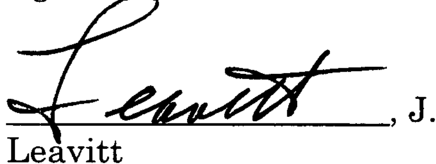
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Leavitt

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Becker

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[24]See SCR 116(1).

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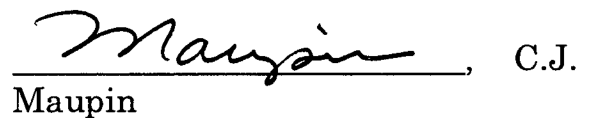
MAUPIN, C.J., dissenting:

I dissent. I agree with the statements of law articulated by the majority, but dissent with regard to the extent of discipline imposed.

It is evident that Mr. Laub exhibited bad judgment and was not truly connected to the operation of his law practice. Also, the panel's factual findings reveal a pattern of negligence and a lack of understanding of the obligations inherent in the attorney-client relationship. However, rather than suspend Mr. Laub, I would impose a public reprimand. In my view, this type of discipline is consistent with the ABA Standards for Imposing Lawyer Sanctions,[25] and given Laub's lack of prior discipline and other mitigating circumstances,[26] would be more appropriate here.



_____________________________, C.J.
Maupin

cc: James W. Bradshaw, Chair,
Northern Nevada Disciplinary Board
Rob W. Bare, Bar Counsel
Allen W. Kimbrough, Executive Director
Lemons Grundy & Eisenberg

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[25]American Bar Ass'n, ABA Standards for Imposing Lawyer Sanctions, in ABA Compendium of Professional Responsibility Rules and Standards 329 (1999). In particular, see Standards 4.43 ("Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.") and 4.63 ("Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.").

[26]See Standards 9.31 (mitigation consists of any circumstance that may justify a reduction in the degree of discipline to be imposed), 9.32(a) (absence of a prior disciplinary record can be a mitigating factor), and 9.32(k) (interim rehabilitation can be a mitigating factor).

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